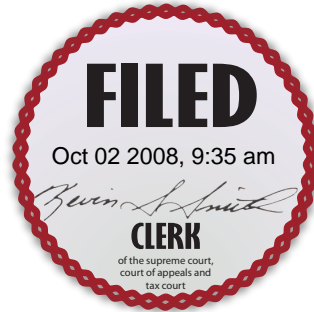


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

SUSAN K. CARPENTER
Public Defender of Indiana

J. MICHAEL SAUER
Deputy Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ELLEN H. MEILAENDER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

YOLANDA G. THOMPSON,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 30A01-0805-PC-213

APPEAL FROM THE HANCOCK CIRCUIT COURT
The Honorable Richard L. Culver, Judge
Cause No.30C01-0703-PC-57

October 2, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Yolanda Thompson appeals the post-conviction court's denial of her petition for post-conviction relief ("PCR"). On appeal, Thompson raises two issues, which we restate as: (1) whether the post-conviction court properly denied Thompson relief on her ineffective assistance of trial counsel claims; and (2) whether the post-conviction court properly denied Thompson relief on her ineffective assistance of appellate counsel claims. Concluding that the issue of ineffective assistance of trial counsel is precluded by the doctrine of res judicata and that Thompson has failed to demonstrate that she was prejudiced by any alleged deficient performance of appellate counsel, we affirm.

Facts and Procedural History

The facts pertinent to this decision as laid out by this court on direct appeal are:

On April 2, 2004, Thompson met with Adrienne Brasher, Andre Bacon, and Thomas Davis at Davis's apartment, and the group discussed robbing a bank in Greenfield and the supplies they needed. Thompson, Brasher, Bacon, and Davis later drove to the bank in Greenfield to plan the route they would drive to the bank and where to park the getaway car. Thompson and Brasher went to Wal-Mart and bought two "pop guns," two blue bags, and two blue jump suits to use in the robbery.¹ Thompson went to Hertz Rental and rented a white Explorer "to be used for the second vehicle when [they] left the bank." Thompson also rented a hotel room at the Dollar Inn at 82nd Street and Shadeland Avenue in Indianapolis.

The morning of April 3, 2004, Brasher, Bacon and Davis headed toward Greenfield with Brasher and Bacon driving the white Explorer that Thompson had rented and Davis driving a blue Pontiac. Before they went to Greenfield, they stopped and parked the white Explorer at an abandoned gas station that was right off the interstate. Davis and Bacon, who were wearing the blue jump suits that Thompson bought at Wal-Mart, told Brasher to put on a jump suit and some rubber gloves. Brasher drove the blue Pontiac to the bank in Greenfield, and Davis and Bacon took the two guns and two bags that Thompson had bought at Wal-Mart and robbed the bank.

¹ Thompson and Brasher bought the guns at a Wal-Mart in Fishers and the bags and jump suits at a Wal-Mart in Indianapolis.

Davis and Bacon returned to the car with their bags of money, and Brasher drove away from the bank. As they were driving, a dye pack that had been placed in one of the bags exploded, and Davis threw the bag out the window. Brasher drove the car on the interstate in an effort to get to the abandoned gas station to get the white Explorer, but the police disabled the car with stop sticks and thereafter arrested Brasher, Davis, and Bacon.

At the Greenfield Police Station, Brasher gave a taped statement to Greenfield Police Lieutenant John Jester and Federal Bureau of Investigation (“FBI”) Agents Scott Ballack and Steven Secor. After initially telling the police that she was forced to participate, Brasher told them that she was a willing participant with Davis and Bacon and also told them that a person named “Yolanda” had rented a white Explorer, which was at the abandoned gas station.

While Brasher was being questioned, Greenfield Police Captain Terry Buckshot went to the abandoned gas station, found the white Explorer, and then had it towed to a garage where it was inventoried. The police traced the license plate on the car to Hertz Rental Car, and then contacted Hertz, who confirmed that the white Explorer had been rented by Yolanda Thompson. During a later inventory of the white Explorer, the police found a rental agreement that contained Thompson’s name on it as the renter of the vehicle and a hotel room key. The police later determined that the hotel key was to a room at the Dollar Inn in Indianapolis that had been rented by Thompson.

Believing that they had probable cause to arrest Thompson, the police and FBI agents had Brasher take them to Thompson’s house in Indianapolis. After the officers knocked on the door, Thompson opened the door and identified herself as Yolanda Thompson. The officers asked Thompson to step outside onto the porch, and they arrested her. . . . One of the FBI agents transported Thompson to the Greenfield Police Station where Thompson gave a recorded statement to the police and the FBI in which she admitted to renting the white Explorer and to going with Brasher to Wal-Mart where “some purchases [were] made.”

On April 5, 2004, the State charged Thompson with conspiracy to commit robbery as a class B felony. On August 31, 2004, Thompson filed a motion to dismiss the charge against her due to deficiencies in the charging information, including a lack of “sufficient detail to properly inform [Thompson] of the alleged acts she is accused of committing or to allow her properly to be able to defend against [the] same.” That same day, Thompson also filed a notice of alibi defense^[2] and a motion in limine seeking to prohibit “any hearsay statements” by Thompson’s co-conspirator, Adrienne Brasher, until the State offered “non-hearsay proof of a conspiracy.”

² The State never filed an answer to Thompson’s notice of alibi defense.

In September 2004, the trial court held a hearing on Thompson's motion to dismiss and motion in limine. The trial court took the motion in limine under advisement and found that the information did not include the names of the alleged victims or the description of the property that was the subject of the criminal activity. The trial court granted Thompson's motion to dismiss^[3]

On November 22, 2004, the State filed an amended information again charging Thompson with conspiracy to commit robbery as a class B felony. Thompson objected to the amended information, and the trial court held a hearing regarding the amended information. Thereafter, the trial court issued an order overruling Thompson's objection to the amended information and allowing the amendment.

. . . During the trial, Brasher testified that Thompson conspired with Brasher, Davis, and Bacon to rob a bank in Greenfield, and Thompson did not object to the testimony.

. . . The trial court . . . [over Thompson's objection] admitted Thompson's taped statement [to police] into evidence.

Following the State's case-in-chief, Thompson moved for a directed verdict based on, among other things, an argument regarding the venue of the trial. Thompson argued that venue was not proper because neither the agreement nor the acts in furtherance of the agreement occurred in Hancock County. The trial court denied Thompson's motion for directed verdict.

The jury found Thompson guilty as charged, and the trial court sentenced Thompson to the Indiana Department of Correction for twelve years with two years suspended.

Thompson v. State, No. 30A05-0504-CR-197, Slip Op. at 3-8 (Ind. Ct. App., Apr. 4, 2006), (citations and quotations omitted) trans. denied.

Thompson appealed her conviction raising the following issues: (1) whether the trial court abused its discretion by admitting into evidence Thompson's taped statement to police; (2) whether the trial court erred by allowing the State to amend the charging information; (3) whether the trial court erred by denying Thompson's directed verdict based on improper venue; (4) whether the evidence was sufficient to sustain Thompson's conviction; (5) whether Thompson's sentence was inappropriate in light of the nature of

³ The trial court issued an order allowing the State to amend the information and finding that such an amendment would not prejudice Thompson because she had notice of facts and circumstances supporting the State's charging information from pre-trial discovery and the probable cause affidavit.

the offense and the character of the offender; and (6) whether Thompson was denied effective assistance of trial counsel.⁴ This court affirmed Thompson's conviction. Id., Slip Op. at 23.

Following her unsuccessful appeal, Thompson filed a petition for PCR⁵ raising the issues of ineffective assistance of trial and appellate counsel.⁶ Thompson argued that her appellate counsel was ineffective because he raised the issue of ineffective assistance of trial counsel on direct appeal thus foreclosing her from raising the issue on PCR and that her appellate counsel failed to effectively present the issue of ineffective assistance of trial counsel. The post-conviction court held a hearing on the petition for PCR on January 7, 2008.

After considering proposed findings of fact and conclusions of law from both parties, the post-conviction court denied Thompson's petition for PCR on March 27, 2008. The post-conviction court found that Thompson's ineffective assistance of trial counsel claims were precluded by the doctrine of res judicata and denied the claims on that basis. The post-conviction court also denied Thompson's ineffective assistance of appellate counsel claims, finding that raising the issue of ineffective assistance of trial counsel on direct appeal does not constitute ineffective assistance of appellate counsel

⁴ On direct appeal, Thompson argued her trial counsel was ineffective because he failed to challenge her warrantless arrest until trial; filed her Motion to Dismiss, Motion in Limine and Notice of Alibi Defense after the omnibus date; and failed to object to the admission of hearsay statements made by Brasher before independent evidence that a conspiracy existed had been presented.

⁵ Thompson filed her original petition for PCR pro se. Later she acquired counsel who filed an amended petition for PCR.

⁶ In her petition for PCR, Thompson argued her trial counsel was ineffective because he failed to use the alibi defense notice statutes to limit the State's presentation of evidence at trial; failed to prevent the State from eliciting evidence of Thompson's post-Miranda invocation of her right to remain silent as affirmative proof of her guilt; and failed to impeach Brasher with prior inconsistent statements.

and that Thompson's appellate counsel adequately argued the claims on appeal. Thompson now appeals.

Discussion and Decision

I. Standard of Review

To obtain relief, a petitioner in a post-conviction proceeding bears the burden of establishing her claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). We accept the post-conviction court's findings of fact unless they are clearly erroneous, but we do not defer to the post-conviction court's conclusions of law. Martin v. State, 740 N.E.2d 137, 139 (Ind. Ct. App. 2000). Moreover, a petitioner who appeals a denial of a petition for PCR, appeals from a negative judgment and therefore must establish "that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." Stevens v. State, 770 N.E.2d 739, 745 (Ind. 2002).

II. Ineffective Assistance of Trial Counsel

Thompson first argues that she received ineffective assistance of trial counsel. Thompson previously litigated this issue in her direct appeal. When the appellate court decides an issue on direct appeal, the doctrine of res judicata applies, thereby precluding the review of the issue in a PCR proceeding. Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000). Once a defendant chooses to raise a claim of ineffective assistance of trial counsel (whether on direct appeal or in a PCR), she must raise all issues relating to that claim. Id. at 259. A reviewing court's resolution of an ineffective assistance of trial counsel claim on direct appeal constitutes res judicata and bars a defendant from

relitigating the issue in a PCR even where she presents additional examples of her counsel's alleged ineffectiveness. Id.

In her direct appeal, Thompson raised, and this court rejected, a claim of ineffective assistance of trial counsel. Thompson, No. 30A05-0504-CR-197, Slip Op. at 18-23. Despite the fact that Thompson attempts to raise new allegations of ineffectiveness, this court's previous decision on the issue is res judicata and bars Thompson from relitigating the issue in a PCR and in this subsequent appeal.⁷ Therefore, the post-conviction court did not err when it denied Thompson relief on her claims of ineffective assistance of trial counsel.

III. Ineffective Assistance of Appellate Counsel

Thompson next argues that she received ineffective assistance of appellate counsel because her appellate counsel should not have raised the issue of ineffective assistance of trial counsel on direct appeal thereby barring her from litigating the issue in her PCR and because her appellate counsel failed to competently argue the issue of ineffective assistance of trial counsel on direct appeal.

The Sixth Amendment entitles a criminal defendant to the effective assistance of counsel, not only at trial, but also during her first appeal as of right. Ben-Yisrayl, 738 N.E.2d at 260 (citing Evitts v. Lucey, 469 U.S. 387, 396 (1985)). We analyze an ineffective assistance of appellate counsel claim similarly to an ineffective assistance of trial counsel claim using the two-prong test set out in Strickland v. Washington, 466 U.S. 668 (1984). Ben-Yisrayl, 738 N.E.2d at 260. First, the petitioner must show that

⁷ To the extent that it is necessary for resolution of Thompson's ineffective assistance of appellate counsel claims, and solely for that limited purpose, we address the merits of Thompson's ineffective assistance of trial counsel claims below.

appellate counsel's performance was deficient or fell below an objective standard of reasonableness; second, the petitioner must show that the deficient performance actually prejudiced the defense. Strickland, 466 U.S. at 687-88. In other words, the petitioner must show that but for appellate counsel's deficient performance, there is a reasonable probability that the result of the appeal would have been different. Id. at 694. Failure to satisfy either prong will cause the claim to fail. Henley v. State, 881 N.E.2d 639, 645 (Ind. 2008).

A. Raising Ineffective Assistance of Trial Counsel on Direct Appeal Rather than on PCR

A Sixth Amendment claim of ineffective assistance of trial counsel, if not raised on direct appeal, may be presented in PCR proceedings. Woods, 701 N.E.2d at 1220. However, if ineffective assistance of trial counsel is raised on direct appeal, the issue will be foreclosed from collateral review. Id. Thompson mischaracterizes our supreme court's opinion in Woods as having "strongly discouraged raising ineffective assistance [of trial counsel] on direct appeal." Appellant's Brief at 14. Such a characterization is far from the truth.

The Woods court laid out three categories of ineffective trial counsel claims: 1) claims such as failure to tender or object to an instruction or failure to object to inadmissible evidence which can be evaluated on the face of the trial record; 2) claims such as failure to investigate an alibi or to pursue an insanity defense which require additional record developments; and 3) "hybrid" claims such as unacceptable ignorance of the law based on an action taken on the record but the evaluation of which requires an evidentiary showing to rebut the presumption of counsel competence. Id. at 1211-13.

Claims falling into the first category are well raised on direct appeal; whereas claims falling into the second category necessarily should be raised on PCR. Id. at 1211-12. The third category, not surprisingly, encompasses some claims that can adequately be brought on direct appeal and some which are better reserved for PCR. Id. at 1212-13. The defendant must decide the best forum for adjudication of the claims – direct appeal or PCR – and may not divide specific contentions between the two proceedings. Id. at 1220. Contrary to Thompson’s characterization, the Woods court held simply that an ineffective assistance of trial counsel claim, if not raised on direct appeal, may be raised on PCR, not that such a claim may only be raised or should always be raised on PCR. See id.

Deciding which issues to raise on appeal is one of the most important strategic decisions of appellate counsel. Stevens, 770 N.E.2d at 760. We show particular deference when reviewing a challenge to an appellate counsel’s decision to include or exclude issues “unless such a decision was unquestionably unreasonable.” Id. (quoting Bieghler v. State, 690 N.E.2d 188, 193 (Ind. 1997)). Appellate counsel’s performance will not be found deficient if the decision to present some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made. Id. Even if the choice was not reasonable, petitioner must still demonstrate a reasonable probability that the outcome of the appeal would have been different. Id.

Thompson’s appellate counsel chose to raise the issue of ineffective assistance of trial counsel on direct appeal rather than preserving the issue for PCR. Thompson’s

appellate counsel alleged on direct appeal that trial counsel's performance was deficient because trial counsel failed to object to a warrantless arrest until trial, filed several motions after the omnibus date, and failed to object to hearsay. These types of deficient performance fall squarely within the first Woods category, namely, those that can be evaluated on the face of the trial record. No extraneous evidence needed to be developed to determine whether Thompson's trial counsel acted deficiently. Even the new allegations of deficiency that Thompson attempts to raise in her PCR, and this appeal – failure to object to admission of evidence regarding alibi, failure to object to evidence that Thompson invoked her right to remain silent, and failure to impeach a witness with prior inconsistent statements – could have been evaluated on the face of the trial record. In addition, Thompson has failed to show (other than simply stating as a foregone conclusion) a reasonable probability that the post-conviction court would have reached a decision regarding the merits of her claims different than this court on direct appeal. Therefore, we cannot say that appellate counsel's decision to raise the issue of ineffective assistance of trial counsel on direct appeal was unreasonable, and appellate counsel's performance was not deficient in this respect.

B. Failure to Adequately Argue Ineffective Assistance of Trial Counsel on Direct Appeal

Thompson next argues that her appellate counsel did not adequately argue her ineffective assistance of trial counsel claim because he failed to raise additional allegations of deficient performance, namely: 1) neglecting to limit the State's evidence based on the State's failure to respond to Thompson's notice of alibi defense; 2) failing to object to evidence regarding Thompson's invocation of her right to remain silent; and 3)

failing to impeach Brasher, one of the State's witnesses, with prior inconsistent statements.

Where a petitioner argues that appellate counsel failed to raise or adequately argue the ineffective assistance of trial counsel, the petitioner faces a compound burden of demonstrating that appellate counsel's performance was deficient and but for the deficiency, trial counsel's performance would have been found deficient and prejudicial. Ben-Yisrayl, 738 N.E.2d at 261-62. If we can dismiss an ineffective assistance claim on the prejudice prong, we need not address whether counsel's performance was deficient. Henley, 881 N.E.2d at 645. In other words, if the evidence supports a finding that any alleged ineffective assistance of trial counsel did not prejudice Thompson at trial, then Thompson's appellate counsel did not perform deficiently in failing to raise such allegations.

1. Failure to limit the admission of evidence based on the State's failure to respond to Thompson's notice of alibi defense

Thompson first argues that her trial counsel performed deficiently when he failed to object to the admission of evidence of overt acts committed outside of Hancock County because the prosecutor had failed to respond to her notice of alibi defense. A criminal defendant charged with a felony who intends to offer evidence of an alibi in her defense must file with the trial court and serve upon the prosecuting attorney a written statement of her intention to offer such defense including specific information concerning the exact place where the defendant claims to have been on the date stated in the indictment or information. Ind. Code § 35-36-4-1. The notice of alibi defense must be filed no later than twenty days prior to the omnibus date. Id. Once the defendant timely

files her notice, the prosecutor has seven days to file in response a specific statement containing the date and the exact place the defendant was alleged to have committed the crime that the prosecutor intends to present at trial. Ind. Code § 35-36-4-2. If the prosecutor intends to present at trial the same date and place listed in the indictment or information as the date and place of the crime, he need not respond to the notice of alibi. Id. However, in that case, the evidence produced at trial by the prosecutor that the defendant was at a place other than the place stated in the information or indictment and that the date was other than the date stated in the information or indictment should be excluded by the trial court. Ind. Code § 35-36-4-3.

Thompson argues that because the State failed to file a response to her notice of alibi defense,⁸ it should have been limited to presenting evidence only of acts that occurred in Hancock County. As a result, Thompson argues that her trial counsel performed deficiently by failing to object to evidence offered by the State regarding acts that occurred outside of Hancock County.

In order to sustain a charge of conspiracy, the State must prove that Thompson, with intent to commit robbery, agreed with another person to commit the felony and that either Thompson or a person with whom she agreed performed an overt act in furtherance of the agreement. Ind. Code § 35-41-5-2. At trial, the State presented evidence that, in

⁸ Initially, we note that it is unclear whether Thompson timely filed her notice of alibi defense. The trial court initially set the omnibus date for June 21, 2004 at which time it also scheduled the pre-trial conference. Thompson did not file her notice of alibi defense until August 31, 2004. Therefore, it would seem that the notice was not timely filed and therefore, the State had no duty to file a response. However, several delays occurred both prior to and after the omnibus date that necessitated continuances of the pre-trial conference including rescheduling by the court due to its own congested calendar and numerous withdrawals and appointments of defense counsel. Although the record reflects several continuances of the pre-trial conference, the record reflects no continuances of the omnibus date. Because we decide below that Thompson was not prejudiced by her trial counsel's failure to object to evidence of acts that occurred outside of Hancock County, we will assume without deciding that Thompson timely filed her notice of alibi defense and that the State failed to respond to it.

furtherance of the agreement, Thompson met to plan the robbery, rented a Ford Explorer for use as a get-away car, rented a hotel room for use after the robbery, purchased BB guns and clothing for use in the robbery, and drove with Davis, Bacon, and Brasher to plan the route to and from the bank that they planned to rob. Thompson argues that the alleged acts of meeting to plan the robbery, renting the Explorer, renting the hotel room, and purchasing BB guns and clothing all occurred outside of Hancock County and, as such, her trial counsel should have objected to evidence relating to those acts. However, even if all of this evidence is excluded, the State still presented evidence that Thompson took part in planning the route to and from the bank, which did occur in Hancock County, and this evidence is sufficient to lead a reasonable jury to find an overt act in furtherance of the conspiracy as well as the agreement to commit the robbery. As a result, Thompson was not prejudiced by any failure of her trial counsel to object to evidence that should have been excluded due to the State's failure to respond to her notice of alibi defense.

2. Failure to object to evidence of Thompson invoking her right to remain silent

Thompson next argues that her trial counsel performed deficiently by failing to object to the State's use of the fact that Thompson invoked her right to remain silent as affirmative proof of her guilt. "While it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings." Kubsch v. State, 784 N.E.2d 905, 914 (Ind. 2003) (quoting Doyle v. Ohio, 426 U.S. 610, 618 (1976)). Such assurance applies both to the use of defendant's silence for impeachment purposes and in the State's case in chief. Id. In this context, silence includes not only muteness, but also the statement of a desire to

remain silent. Id. A constitutional error may, however, be harmless if it is clear beyond a reasonable doubt that the error did not contribute to the defendant's conviction. Id. In analyzing whether the use of a defendant's silence against her is harmless beyond a reasonable doubt, this court examines five factors: "1) the use to which the prosecution puts the post-arrest silence; 2) who elected to pursue the line of questioning; 3) the quantum of other evidence indicative of guilt; 4) the intensity and frequency of the reference; and 5) the availability to the trial court of an opportunity to grant a motion for mistrial or give a curative instruction." Id. at 914-15 (citing Robinette v. State, 741 N.E.2d 1162, 1165 (Ind. 2001)).

The issue of Thompson invoking her right to remain silent arose in numerous contexts during the trial. During the State's direct examination of FBI Agent Secor, who questioned Thompson after her arrest, Secor testified, "When we asked her to clarify what purchases were made Ms. Thompson invoked her right to silence at that point and we ended questioning." Transcript at 280. Later, Secor testified, "Yes, ma'am we did [try to clarify an earlier statement of Thompson's] and that's when Ms. Thompson ended – or invoked her right to silence." Id. at 281. In its cross-examination of Thompson, the State read from the transcript of Thompson's post-arrest questioning. After recounting the FBI informing Thompson that it is a federal crime to lie to an FBI agent with a penalty of five years in prison, the State asked Thompson, "FBI 'What did you buy at Wal-Mart?' Your response was 'I refuse to answer any other questions then.' FBI 'Have you been lying to us then?' Yolanda Thompson, 'No, I have not but I tell you what I stop

right now. So what you gonna [sic] do? Where do we go from here?’ Do you recall that?” Id. at 435-36.

It is clear from the transcript that the State only purposely broached the subject of Thompson invoking her right to remain silent on one occasion during its cross-examination of Thompson. During the direct examination of the questioning agent, Secor volunteered that Thompson invoked her right to remain silent in his narrative of the questioning and the State did not pursue the issue any further. The State did not discuss Thompson’s silence in any other portion of the proceedings and did not argue it in its closing arguments.

Additionally, Thompson’s trial counsel also raised Thompson’s silence in her defense in his opening statement, “She was literally a little gun shy. She clammed up, stopped talking. Her[e] in the environment of the courtroom she’ll talk. She’s got a version and she’ll tell it to you,” Id. at 77, and in his closing argument, “She talks to them. She spins a little yarn. Doesn’t know why she’s there. Finally says, I just shut up. I quit. I’m not talking to you guys anymore.” Id. at 492. Thompson herself, volunteered the fact that she “refused to answer any more of their questions” on direct examination by her trial counsel. Id. at 408.

Considering the Doyle factors, the State made very little use of Thompson’s post-arrest silence and such use was neither intense nor frequent. The State purposely pursued the issue only once on cross examination of Thompson and ignored it when voluntarily raised by one of its witnesses, Secor. In addition, the State only purposely pursued the line of questioning after Thompson’s trial counsel had raised the issue in his opening

statement and Thompson had testified to her silence on direct examination by her trial counsel. Rather, the State relied heavily on the testimony of Brasher and the circumstantial physical evidence to establish Thompson's guilt. Therefore, we hold that an analysis of the use of Thompson's silence using the Doyle factors demonstrates beyond a reasonable doubt that any error in admitting evidence of Thompson's silence was harmless. Therefore, Thompson was not prejudiced by her trial counsel's failure to object to the admission of evidence of her silence.

3. Failure to impeach Brasher with prior inconsistent statements

Finally, Thomson argues that her trial counsel performed deficiently by failing to impeach Brasher with prior inconsistent statements made during Brasher's police questioning. To show ineffective assistance, Thompson must show that trial counsel's failure to impeach Brasher rendered the result of the trial unfair or unreliable. See Johnson v. State, 675 N.E.2d 678, 686 (Ind. 1996).

Contrary to Thompson's assertions, her trial counsel repeatedly elicited admissions from Brasher that some of her statements to police were inconsistent with her testimony and that she had lied to the police: "Q. Well you just told [the Prosecutor] that you told that first statement and it was a lie and you came clean the second time. A. Yes, sir," tr. at 114; "Q. So even after you came clean with the FBI you're still lying to them, is that a correct statement? A. Yes, sir," id. at 115; "Q. And you said a lot in your first statement to the police that that's when a gun was pulled on you and made you change and all that. Did any of that occur? A. No, Sir," id. at 124; "Q. So the eight times that you told the police that someone pulled a gun on you, you were lying. A. Yes, sir," id. at

125. In addition, trial counsel questioned Brasher about inconsistencies in the time line of events in her testimony at trial: “Okay. Well now it couldn’t have happened later on that night because you said that you went to the Wal-Mart and got the guns on Thursday and you said that you went to the Wal-Mart and got the clothes on Friday night.” Id. at 125. Trial counsel also noted to the jury in his opening statement and closing argument that Brasher’s testimony contained numerous inconsistencies. Thompson’s trial counsel adequately called into question Brasher’s reliability as a witness using her prior statements to police and her testimony at trial. Therefore, Thompson has failed to overcome the presumption that her trial counsel performed adequately with respect to the impeachment of Brasher.

Thompson has failed to demonstrate any ineffective assistance of trial counsel. As a result, she has also failed to demonstrate ineffective assistance of appellate counsel because she cannot show that the outcome of her appeal would have been different had appellate counsel raised the foregoing claims.

Conclusion

This court’s prior determination of Thompson’s claims of ineffective assistance of trial counsel is res judicata and therefore, Thompson cannot relitigate the issue on appeal from the denial of her petition for PCR. Thompson’s appellate counsel did not perform deficiently in raising the issue of ineffective assistance of trial counsel on direct appeal rather than on PCR, nor did her appellate counsel fail to adequately argue the issue of ineffective assistance of trial counsel on appeal. Therefore, the post-conviction court did not err when it denied Thompson’s petition for PCR.

Affirmed.

NAJAM, J., and MAY, J., concur.